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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER 97-0394 ST
SALES AND USE TAX

For Tax Periods: 1993 Through 1995

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

Issue

Sales and Use Tax- Public Transportation Exemption
Authority: IC 6-2.5-3-2, IC 6-2.5-5-27, IC 26-1-2-319(1), National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue, 741 N.E.2d 816 (Ind. Tax 2001).

The taxpayer protests the assessment of tax on certain trucks, gasoline, parts and accessories for those trucks.

Statements of Facts

The taxpayer is an Indiana corporation that has two separate business locations. It operates a stone manufacturing plant and service operations and two trucking operations. The Indiana Department of Revenue assessed additional sales and use tax, interest and penalties after a routine audit. The taxpayer timely protested the assessment. Further facts will be provided as necessary.

Sales and Use Tax-Public Transportation Exemption

Discussion

IC 6-2.5-3-2 imposes the use tax on "the storage, use, or consumption of tangible personal property in Indiana,. . . " Certain items qualify for the public transportation exemption to the use tax pursuant to the following provisions of IC 6-2.5-5-27:

> Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

Within its corporate structure the taxpayer operates two kinds of trucking operations. The first trucking operation is for local hauling of its own property. It hauls stone from the stone quarry to the mill where the stone is cut to customers' orders. The second trucking operation is operated pursuant to an Interstate Commerce Commission permit as a for hire carrier. The auditor determined that the percentages of the taxpayer's trucking operations which are attributable to the hauling of their own products are 41.4%, 39.31% and 56.10% for 1993, 1994 and 1995 respectively. In the two years, 1993 and 1994, that the taxpayer's trucking operation pursuant to an Interstate Commerce Commission permit as a for hire carrier was the predominate trucking operation, the auditor granted the taxpayer exemption on these trucks, parts, trailers and fuel pursuant to the public transportation exemption. In 1995, the year that the taxpayer's trucking operation pursuant to an Interstate Commerce Commission permit as a for hire carrier was not the predominate trucking operation, the auditor did not grant the taxpayer exemption pursuant to the public transportation exemption. The audit agreed that the taxpayer properly paid the sales tax on property purchased for the trucking system that transported its own goods.

The taxpayer paid sales tax on the trucks, parts and trailers and most of the fuel on these trucks. The taxpayer mistakenly did not pay tax on some of the fuel and has rectified this situation. The taxpayer contends that the trucks, repair parts, trailers and fuel used in the for hire trucking operation qualify for the public transportation exemption from the use tax for each year of the audit period.

The issue to be determined in this case is how the public transportation exemption from the use tax applies to a taxpayer that transports both its own property and property belonging to others pursuant to governmental regulations.

The Indiana Tax Court has addressed the issue of public transportation in several cases. The first two cases involved contract hauling of garbage. In National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), the Court stated that although National Serv-All "engaged in 'public transportation' when it hauled Contract garbage," nonetheless National Serv-All did not prove "that its hauling of Contract garbage was the *predominant share* of its use of the items at issue." Id. At 959. (Emphasis in the original). The Court concluded: "Although National engaged in the public transportation of property within the meaning of IC 6-2.5-5-27 when it hauled Contract garbage, it did not prove it predominantly engaged in public transportation." Id. at 960.

The Court faced a similar issue concerning the applicability of the public transportation exemption to the contract hauling of garbage in Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994). In that case the Court held as follows:

> Waste Management's maximum annual revenue from public transportation was 17.7 percent of its total revenue, and therefore, the remaining 80 percent of its revenue came from non-public transportation. The predominant use of Waste Management's trucks and other items, therefore, is not exempt. . .

Id. at 962.

The third case dealing with this issue in Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue, 741 N.E.2d 816 (Ind. Tax 2001). The petitioners were pipeline companies that transported natural gas belonging to third parties and natural gas belonging to the petitioners. In each case, the predominate use of the pipelines was to transport natural gas belonging to others. The Court, after noting the relevance of its two previous cases on public transportation, stated the following.

> If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.

Id. at 819.

The Indiana Tax Court has set out a two-pronged test to determine if a particular business qualifies for the public transportation exemption from sales and use tax. First the taxpayer must be predominately engaged in public transportation of the property of another. Secondly, the taxpayer's property must be predominately used for providing public transportation.

The first prong looks at the taxpayer itself. A determination must be made whether or not the taxpayer is engaged in public transportation. The second prong looks at the individual units to determine how they are used. Both prongs must be satisfied for the taxpayer to qualify for the public transportation exemption.

In this situation, the taxpayer is primarily engaged in the quarrying and processing of stone. It is not predominately engaged in public transportation. Therefore, having failed the first prong of the test, the taxpayer does not qualify for the public transportation exemption from the sales and use tax for any of the years of the audit.

Finding

The taxpayer's protest is denied.

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